

STEPHEN C. STEINBERG (SBN 230656)  
*ssteinberg@bzbm.com*

TIFFANY S. HANSEN (SBN 292850)  
*thansen@bzbm.com*

BARTKO ZANKEL BUNZEL & MILLER  
A Professional Law Corporation  
One Embarcadero Center, Suite 800  
San Francisco, California 94111  
Telephone: (415) 956-1900  
Facsimile: (415) 956-1152

Mark S. Palmer (SBN 203256)  
*mark@palmerlex.com*  
4 Meadow Drive  
Mill Valley, California 94941  
Telephone: (415) 336-7002  
Facsimile: (415) 634-1671

Attorneys for Defendants and Counter-Claimants  
PAUL REICHE III and ROBERT FREDERICK  
FORD

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

STARDOCK SYSTEMS, INC.,

Plaintiff,

v.

PAUL REICHE III and ROBERT  
FREDERICK FORD,

Defendants.

Case No. 4:17-CV-07025-SBA (JCS)

**COUNTER-CLAIMANTS' OPPOSITION  
TO CROSS-DEFENDANT GOG'S  
MOTION TO DISMISS COUNT NINE OF  
SECOND AMENDED COUNTERCLAIM**

Judge: Hon. Sandra Brown Armstrong

Date: March 13, 2019

Time: 2:00 p.m.

AND RELATED COUNTER-CLAIM.

**I. INTRODUCTION**

GOG Sp. z.o.o. ("GOG") contends that Paul Reiche III and Robert Frederick Ford ("Reiche & Ford") do not adequately plead a claim for Fraud against GOG. GOG's contentions are without merit. In making its motion, GOG doggedly ignores the paragraphs of the Counter-Claim containing factual allegations, instead myopically focusing only on the paragraphs below

1 the heading for the 9th Claim for Fraud. Review of the factual pleadings set forth in paragraphs  
2 19 through 162 set forth sufficient facts to state a claim for fraud.

3 In the event more factual detail is required to satisfy the requirements of Rule 9 of the  
4 Federal Rules of Civil Procedure, Reiche & Ford can plead such facts. GOG, however, is fully on  
5 notice of the claim being brought against it, and additional rounds of pleadings would put form  
6 over substance. In short, Plaintiff Stardock Systems, Inc. alleges in its complaint that the Star  
7 Control trademark was infringed when sales of Star Control I and II continued on GOG after  
8 purported expiration of the Atari trademark license agreement on or about March 22, 2015. (Third  
9 Amended Complaint (“TAC”), Doc. 72, ¶ 151; Stardock Systems, Inc. Response to Special  
10 Interrogatory 14.) In the event that Stardock Systems, Inc.’s allegations are true, then GOG  
11 fraudulently concealed the alleged lapse of its separate and confidential trademark license  
12 agreement with Atari, and persisted in selling Star Control I and II despite an alleged material  
13 change in circumstances. GOG intentionally did not disclose the alleged lapse of its trademark  
14 license to Reiche & Ford, who had no way to know the expiration date of the GOG-Atari  
15 agreement due to the confidentiality provisions contained therein.

16 Reiche & Ford can plead with greater specificity the who, what, where, when, of GOG’s  
17 alleged fraudulent concealment, and if such greater specificity is required Reiche & Ford should  
18 be allowed to do so. Reiche & Ford respectfully request this Court deny GOG’s motion to dismiss.  
19 If the Court grants the motion, Reiche & Ford request that they be given leave to amend to plead  
20 Count 9 with greater specificity.

## 21 **II. FACTUAL BACKGROUND**

22 In addition to the factual background offered by GOG, Reiche & Ford pleaded that the  
23 Atari-GOG agreement allegedly expired on March 22, 2015, purporting to remove GOG’s license  
24 to the Star Control trademark. (SAC ¶ 152.) GOG had exclusive knowledge of this alleged  
25 expiration, as the Atari-GOG agreement was confidential. (SAC ¶ 83.) Reiche & Ford previously  
26 tendered Stardock Systems, Inc.’s trademark infringement claim relating to the ongoing sales to  
27 GOG pursuant to the terms of the agreement Reiche & Ford have with GOG, and GOG refused to  
28 indemnify Reiche & Ford. (SAC ¶¶ 157-58.)

1 **III. ARGUMENT**

2 **A. GOG Concealed Information It Had a Duty to Disclose.**

3 “An action for deceit will lie for the ‘suppression of a fact, by one who is bound to disclose  
4 it, or who gives information of other facts which are likely to mislead for want of communication  
5 of that fact.’” 5 Witkin, Summary 11th Torts § 912 (2018). “The duty to disclose may arise  
6 without any confidential relationship where the defendant alone has knowledge of material facts  
7 that are not accessible to the plaintiff.” 5 Witkin, Summary 11th Torts § 916 (2018). “[I]n  
8 California active concealment or suppression of fact by a nonfiduciary is the equivalent of a false  
9 representation, such as where the party has exclusive or superior knowledge of material facts not  
10 known to the opposing party to the transaction and fails to disclose them.” *Encompass Holdings,*  
11 *Inc. v. Daly*, No. C09-1816 BZ, 2011 WL 13249831, at \*1 (N.D. Cal. Oct. 21, 2011).

12 Here, GOG knew it would lose, and in fact did allegedly lose, the license to the Star  
13 Control trademark on March 22, 2015. Nevertheless, GOG did not disclose this material  
14 information to Reiche & Ford. In reliance thereon, Reiche & Ford allowed the distribution of Star  
15 Control I and II to continue on GOG. In so doing, GOG’s intentional omission (allegedly) exposed  
16 Reiche & Ford to liability to trademark infringement. None of the GOG personnel involved in the  
17 Star Control distribution agreements informed Reiche & Ford of the change in circumstances at  
18 any time.

19 **B. If the Second Amended Counterclaim Is Insufficient, Reiche & Ford Should**  
20 **Be Given Leave to Amend.**

21 Reiche & Ford can name names at GOG, and could submit a complaint under seal listing  
22 the provisions in the confidential agreement between Atari and GOG. GOG, however, has all of  
23 this information already. Reiche & Ford can and will plead as many facts as are required in order  
24 to simply move this case forward to resolution.

25 **IV. CONCLUSION**

26 Reiche & Ford respectfully request that GOG’s motion to dismiss Count 9 for Fraud of the  
27 Second Amended Counterclaim be denied. If the Court grants the motion, Reiche & Ford  
28 respectfully request leave to amend to plead with greater specificity the fraud claim.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DATED: February 11, 2019

BARTKO ZANKEL BUNZEL & MILLER  
A Professional Law Corporation

By: /s/ Stephen C. Steinberg  
Stephen C. Steinberg  
Attorneys for Defendants and Counter-Claimants  
PAUL REICHE III and ROBERT FREDERICK  
FORD

**PROOF OF SERVICE**

**Stardock Systems v. Paul Reiche III and Robert Frederick Ford**  
**U.S. District Court, Northern District of California, Case No. 4:17-CV-07025-SBA**

At the time of service, I was over 18 years of age and not a party to this action. My business address is One Embarcadero Center, Suite 800, San Francisco, CA 94111.

On February 11, 2019, I served a true copy of the following document(s) described as **COUNTER-CLAIMANTS' OPPOSITION TO CROSS-DEFENDANT GOG'S MOTION TO DISMISS COUNT NINE OF SECOND AMENDED COUNTERCLAIM** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 11, 2019, at San Francisco, California.

/s/ Terry Ingroff  
Terry Ingroff

**SERVICE LIST**

**Stardock Systems v. Paul Reiche III and Robert Frederick Ford  
U.S. District Court, Northern District of California, Case No. 4:17-CV-07025-SBA**

Robert A. Weikert (Bar No. 121146)  
[rweikert@nixonpeabody.com](mailto:rweikert@nixonpeabody.com)  
Dawn N. Valentine (Bar No. 206486)  
[dvalentine@nixonpeabody.com](mailto:dvalentine@nixonpeabody.com)  
NIXON PEABODY LLP  
One Embarcadero Center, Suite 1800  
San Francisco, CA 94111-3600  
Tel: (415) 984-8385  
Fax: (866) 294-8842

*Attorneys for Stardock Systems, Inc.*

Jason T. Kunze (appearance *pro hac vice*)  
[jkunze@nixonpeabody.com](mailto:jkunze@nixonpeabody.com)  
Deanna R. Kunze (appearance *pro hac vice*)  
[dkunze@nixonpeabody.com](mailto:dkunze@nixonpeabody.com)  
NIXON PEABODY LLP  
70 W. Madison St., 35th Floor  
Chicago, IL 60602  
Tel: (312) 977-4400

*Attorneys for Stardock Systems, Inc.*

David L. May (appearance *pro hac vice*)  
[dmay@nixonpeabody.com](mailto:dmay@nixonpeabody.com)  
Jennette E. Wiser (appearance *pro hac vice*)  
[jwiser@nixonpeabody.com](mailto:jwiser@nixonpeabody.com)  
NIXON PEABODY LLP  
799 9th Street NW  
Washington, DC 20001-4501  
Tel: (202) 585-8200  
Fax: (202) 585-8080

*Attorneys for Stardock Systems, Inc.*

Joseph R. Taylor  
[jtaylor@fkks.com](mailto:jtaylor@fkks.com)  
Jessica R. Medina  
[jmedina@fkks.com](mailto:jmedina@fkks.com)  
Tricia Legittino  
[tlegittino@fkks.com](mailto:tlegittino@fkks.com)  
FRANKFURT KURNIT KLEIN & SELZ PC  
2029 Century Park East, Suite 1060  
Los Angeles, CA 90067  
Tel: (310) 579-9600  
Fax: (310) 579-9650

*Attorneys for GOG Limited and GOG Poland  
SP. Z.O.O.*